87-6700

No. 87 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether procedural default on a Franklin v. Lynaugh claim can be found without first examining the complete record of judicial response to such a claim at the time it could have been timely raised, and without examining whether the need to avoid a "fundamental miscarriage of justice" calls for avoidance of the procedural default rule?

2. Whether a condemned Texas prisoner who presents the same issue that is before the Court in Franklin v. Lynaugh must have his execution stayed pending the decision of Franklin.

3. Even if the Court decides in Franklin v. Lynaugh that the Texas death penalty statute does not preclude the jury's consideration of mitigating circumstances in violation of the Eighth Amendment, whether a condemned Texas prisoner must be given the opportunity to show that reasonably effective counsel could nevertheless have construed the statute as precluding the consideration of some mitigating circumstances, and that, because his lawyer held this view, relevant mitigating evidence was not investigated or presented on his behalf, thereby depriving him of the assistance of counsel and of an individualized sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments?

4. Whether the pendency before the en banc Fifth Circuit in another case of the very same issue raised by petitioner requires that petitioner's case be held for the en banc decision and precludes the panel before whom petitioner's case is heard from deciding the merits of that issue itself?

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PETITION FOR WRIT OF CERTIORARI
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FOR THE FIFTH CIRCUIT

Petitioner, JOHN HENRY SELVAGE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals was announced on March 28, 1988 and has not yet been reported. A copy of the opinion is annexed hereto as Appendix A. The opinion of the United States District Court for the Southern District of Texas, from which Mr. Selvage took his appeal to the Court of Appeals, is also unreported but a copy is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

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Skipper v. South Carolina, ___U.S.___, 90 L.Ed.2d 1 (1986)	16
Smith v. Murray, ___U.S.___, 91 L.Ed.2d 434 (1986)	11,14
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> In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense[;]

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law....

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Mr. Selvage was convicted of capital murder on February 8, 1980, and was thereafter sentenced to death on February 11, 1980, in the District Court for the 230th Judicial District, Harris County, Texas. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals on July 11, 1984. Selvage v. State, 680 S.W.2d 17 (Tex. Crim. App. 1984). No petition for writ of certiorari was filed with respect to this opinion.

Mr. Selvage thereafter filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas. Relief was denied October 6, 1986, and the Fifth Circuit affirmed July 23, 1987. Selvage v. Lynaugh, 823 F.2d 845 (5th Cir. 1987). Certiorari was denied October 2, 1987. Selvage v. Lynaugh, ___U.S.___, 98 L.Ed.2d 268 (1987).

On January 21, 1988, Mr. Selvage filed a state habeas corpus petition in the District Court for the 230th Judicial District, Harris County, Texas. The trial court recommended denial of the petition on March 14, 1988, and on March 21, 1988, the Texas Court of Criminal Appeals adopted the recommendation. Ex parte Selvage, No. 16, 884-02.

On March 22, 1988, Mr. Selvage activated a petition for writ of habeas corpus which had previously been lodged in the United States District Court for the Southern District of Texas. On March 25, 1988 the District Court entered orders dismissing three of the four claims presented by Mr. Selvage, withholding

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adjudication of the fourth claim because it was identical to the issue pending before the en banc Fifth Circuit in King v. Lynaugh, 828 F.2d 257 (5th Cir.), reh. en banc granted, 828 F.2d 269 (5th Cir. 1987), and granting a stay of Mr. Selvage's execution which was scheduled for March 30, 1988 (after midnight on March 29, 1988).[1] The state then moved the Fifth Circuit to dissolve the stay of execution, and Mr. Selvage appealed from the dismissal of three of his claims and sought a stay of execution in connection with the appeal in the event the District Court's stay was dissolved. On March 28, 1988, the Fifth Circuit granted the state's motion, denied Mr. Selvage's request for a stay, and denied a certificate of probable cause.

B. Material Facts

1. The Franklin Claim

During the penalty phase of Mr. Selvage's trial, the state offered additional evidence to show "a probability" that Mr. Selvage "would commit criminal acts of violence that would constitute a continuing threat to society." R. 112. Two prior federal convictions were introduced, one for possession of controlled substances, the other for conspiracy to commit bank robbery. R. 2894. In neither case was there any indication that any person was harmed.

The state also introduced evidence of Mr. Selvage's attempted escape from the New Orleans parish prison. Captain Ronald Cherry told the jury that on July 22, 1975, while incarcerated in the parish prison, Mr. Selvage escaped. R. 2897. In fact, on cross-examination, the jury learned that, in attempting to escape, Mr. Selvage fell several floors and sustained significant injuries requiring hospitalization. No escape from the institution was effectuated. R. 2902.

Finally, the state presented two witnesses who implicated Mr. Selvage in a robbery/murder at a "Stop & Go" store, committed

[1] On March 28, 1988, the District Court entered a revised order which incorporated the language of Fed. R. Civ. Proc. 54(b), thereby permitting immediate appeal of the decision to dismiss three of the four claims in the habeas petition.

just four days before the robber/murder with which Mr. Selvage was charged in his capital trial. Mr. Selvage was never formally charged with this crime, he was never brought to trial, and to this day he is still presumed innocent of that offense. One witness identified Mr. Selvage before the capital sentencing jury as one of the two assailants in the robbery, although he admitted to having failed to identify Mr. Selvage as an assailant during identification proceedings occurring shortly after the crime itself. R. 2860-61. The other witness also identified Mr. Selvage as one of the two robbers, but he too admitted that before the capital trial, he was shown at least three photo spreads, and in response to each, positively identified persons other than Mr. Selvage as the assailant. R. 2879. Aside from these witnesses' testimony, the state offered no other evidence linking Mr. Selvage to the July 26 incident. During his penalty phase argument, the prosecutor urged the jury to answer the two statutory questions affirmatively, in significant part, because "[w]e know of two robberies and two killings." R. 2968.

The defense offered mitigating evidence through Audrey Picou, Mr. Selvage's older sister. Ms. Picou initially described her brother's upbringing. She told the jury that he had been raised in a very close, religious family, and unlike other children they knew, had been exposed to the arts and music. R. 2895-2912. During his school years, she described Mr. Selvage as being an "A" and "B" student. Id. Throughout his early and school years, Mrs. Picou testified that he was a happy, normal child.

In 1968, she recalled, Mr. Selvage was drafted into the Army. When he was discharged not quite two years later, he came back a different person. In her terms "he came back in a straightjacket." R. 2910. He had become addicted to heroin and spent several months in Army hospital treatment centers. When he finally returned to New Orleans, he was not able to work for a period of time, but later found work at a gas station.

She testified further that she had never seen Mr. Selvage exhibit violent behavior and opined that he was a peaceful

person. This was consistent with their family, she said: no other family member had ever been arrested. She also opined that Mr. Selvage had the strength of character to be rehabilitated.

Finally, the defense called Dr. Jose Garcia, Chief of Mental Health Services for the Texas Department of Corrections. R. 2924. Dr. Garcia described in detail the numerous rehabilitative programs offered by the Department of Corrections to inmates.

The trial court's sentencing charge thereafter was cryptic and made no mention of Mr. Selvage's mitigating evidence. Instead, it focused almost exclusively upon special issues 1 and 2:

> MEMBERS OF THE JURY: By your verdict returned in this case you have found the Defendant guilty of the offense charged in the indictment, that is, Capital Murder, which was alleged to have been committed in Harris County, Texas, on or about the 30th Day of July, 1979.
>
> You are instructed that the punishment for capital murder is by death or confinement in the penitentiary for life.
>
> In connection with your consideration of the evidence presented with respect to the assessment of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall also give you. The State must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.
>
> You are not to discuss among yourselves how long the accused would be required to serve the sentence that you impose. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor, and are no concern of yours.
>
> You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously; and you may not answer any issue "No" unless ten (10) or more jurors agree.
>
> ISSUE NO. 1
>
> Do you find from the evidence beyond a reasonable doubt whether the conduct of the defendant, John Henry Selvage, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
> ANSWER: _____

> ISSUE NO. 2
>
> Do you find from the evidence beyond a reasonable doubt whether there is a probability that the defendant, John Henry Selvage, would commit criminal acts of violence that would constitute a continuing threat to society?
> ANSWER: _____

R. 111-112.

2. <u>The Claim that the Texas Death Penalty Statute Interfered with Defense Counsel's Investigation and Presentation of Mitigating Evidence</u>

This claim relied entirely upon proffers of fact outside the trial record. Three areas of material fact were proffered:

First, Mr. Selvage sought to prove that his trial attorneys forewent the investigation and presentation of mental illness as a mitigating circumstance in his case because they believed that the Texas statute precluded the proper consideration of mental illness as a mitigating circumstance. Mr. Selvage's lead trial counsel explained the decision not to investigate and present such evidence in the affidavit he provided to Mr. Selvage's present attorneys, included as Appendix F to the habeas petition:

> My co-counsel and I decided early in our representation of Mr. Selvage that we would not present evidence of mental illness in the penalty phase of the trial, no matter how strong it was, because we believed the jury would not be able to consider such evidence as a mitigating circumstance.
>
> By the time this case was tried in early 1980, the State's use of Dr. Ernest Grigson to show that a capital defendant would likely be dangerous in the future was well known. Whatever the disorder suffered by a capital defendant, from antisocial personality disorder to major mental illnesses like schizophrenia, Dr. Grigson was able to persuade juries that <u>any disorder increased the likelihood</u> that the defendant would be dangerous in the future. Once the jury found that mental illness increased the likelihood of the defendant's future dangerousness, the jury was obliged to answer Special Issue 2 "yes." Through the use of witnesses like Dr. Grigson, therefore, the State was able to convert otherwise mitigating evidence like mental illness into evidence in support of an aggravating circumstance.
>
> Since the jury was able to consider only one other question in Mr. Selvage's case -- the deliberateness question posed by Special Issue 1 -- we were convinced that even if we did present evidence of mental illness, with the problems attendant to Special Issue 2, the jury would still have no meaningful way of considering the mental illness evidence as a mitigating circumstance. The jury could quite readily find that

the homicide was sufficiently deliberate to answer Special Issue 1 "yes" even if Mr. Selvage did suffer from a severe mental illness. In our experience it was rare for jurors to find mental illness so incapacitating as to interfere with a defendant's ability to commit deliberate acts. And if the jury answered Special issue 1 "yes," having already answered Special Issue 2 "yes," the death sentence was mandatory.

Given these considerations, we decided that Mr. Selvage's interests could not be served by investigating and presenting evidence of any mental illness from which he suffered. On the one hand, the jury could be forced to treat such evidence as aggravating, and on the other, the jury was extremely unlikely to consider mental illness as negating the deliberateness of the crime. The jury was given no third option under the Texas statute -- to consider whether the evidence of mental illness was substantial enough as a mitigating circumstance to call for a life sentence, even in the face of the affirmative findings on the special issues. Thus, we could conceive of no way that such evidence could help Mr. Selvage.

If, on the other hand, Texas had offered such a third option to the jury, our strategy would have been different. At the very least, we would have investigated Mr. Selvage's mental health history. And if we had found evidence of serious mental illness, we likely would have presented it. Even though, in such circumstances, evidence of mental illness might still have increased the possibility that the jury would find that Mr. Selvage posed a threat of future violence, the evidence could have served as an even stronger countervailing factor -- as a reason to impose life that was weightier than the reason to impose death because of the threat of future dangerousness. Without investigation, we could not have known if such evidence was available to Mr. Selvage -- so at a minimum, we would have investigated this matter.

Appendix F, Appendix to Petition Writ of Habeas Corpus, at 1-3.[2]

Second, Mr. Selvage offered to prove that his attorneys' understanding of the operation of the Texas statute was reasonable. In connection with this, he conceded that his attorneys' understanding of the statute might have been in error, and that if the Court were to decide Franklin v. Lynaugh, No. 87-5546, against the petitioner, Franklin would show that counsel's understanding was erroneous. Nevertheless, Mr. Selvage contended, if his attorneys understanding were reasonable, he would still have a claim of constitutional error. In this

[2] The same attorney who provided this affidavit provided a second affidavit to the state which was in some ways contradictory of this affidavit. Because no court has ever held an evidentiary hearing to resolve this conflict, the Fifth Circuit took the affidavit appended to the habeas petition as true.

context, Mr. Selvage sought an opportunity to show through the testimony of other Texas criminal defense lawyers that his attorneys' view was a reasonable view of the statute's operation.

Third, Mr. Selvage offered to prove that if his attorneys had not been deterred in the investigation and presentation of mental illness as a mitigating circumstance, they would have discovered substantial evidence that he suffered from a serious mental illness at the time of the crime herein. As set forth in detail in the habeas petition, Mr. Selvage had a well-documented history of psychosis and paranoid schizophrenia by the time he participated in the crime. Id., at pages 17-18 (Air Force medical records), 18-19 (United States Bureau of Prisons medical records). Further, from the time Mr. Selvage was put on death row to the present, Texas Department of Corrections mental health personnel have consistently diagnosed him as suffering from psychosis. Id., at pages 20-22.

In a recent evaluation of Mr. Selvage, Dr. James Merikangas explained that Mr. Selvage's psychosis likely would have substantially impaired his capacity to appreciate the wrongfulness of his criminal conduct or to refrain from engaging in such conduct at that time:

> In my opinion, John Selvage was not fully responsible for his behavior at that time. His psychosis, the residual effects of his severe and long history of drug abuse including opiates and amphetamines, in combination, resulted in a diminished capacity to appreciate the wrongfulness of his conduct and rendered him less than fully capable of conforming his conduct to the requirements of law. According to John, he was high on heroin and amphetamines at the time of the crime. Amphetamines alone can induce a paranoid state and generate increased motor activity, resulting in paranoid ideation and violent acts which may be completely spontaneous or in response to command hallucinations.... The severity of John's psychosis would likely have caused him to misperceive simple gestures as threats and to act on them without any basis in reality. While these combined factors could have produced a violent, uncontrolled outpouring of aggressive behavior, John's use of heroin could have mollified his aggression -- if the dosage were high enough -- and taken away his will to act. In this state, without the ability to perceive the external world accurately and make appropriate judgments in

> response to it because of his psychosis, John could have been peculiarly susceptible to the coercion, influence, and designs of others. In either event, I am of the opinion, to a reasonable medical certainty, that John could not distinguish the boundaries between right and wrong and could not in any way reign in his behavior to conform to the expectations of the external world.

Petition for Writ of Habeas Corpus, at pages 22-23.

3. The Claim Concerning the Right to Voir Dire on the Meaning of a Life Sentence in Texas

Throughout the several days of jury selection in this case, the defense repeatedly attempted to learn what jurors understood a life sentence to mean under Texas law. For example, when defense counsel was questioning potential juror Edward Jefferson, he asked: "[N]ow, Mr. Jefferson, when we talk about a life sentence in the penitentiary what do you think a life sentence is? How long do you think a person has to serve --." R. 934. Before Jefferson was able to answer, the trial court ruled that he could not answer the question. Id. Whenever the questions of parole or the length of a life sentence arose thereafter, the court prevented any inquiry or discussion. See R. 1060-61; 1093-95.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The Fifth Circuit decided that Mr. Selvage's claim under Franklin v. Lynaugh -- that the Texas capital sentencing procedure prevented the jury's consideration of the mitigating evidence he presented -- was barred from federal habeas review by procedural default at trial:

> We are not persuaded that Selvage has a likelihood of succeeding on this claim. Selvage's first difficulty is that he did not object to the court's charge at the punishment phase of the trial; he requested no instruction on mitigating evidence, and did not otherwise question the capital sentencing structure on the grounds he now urges .... We find no legal cause for the absence of objection.... [T]he issue is not a recently found legal theory not knowable by competent trial counsel. Reed v. Ross, 468 U.S. 1 (1984) (so novel that its legal basis is not reasonably available). Nor is its rejection by the Texas Court of Criminal Appeals a legal excuse for not objecting....
>
> [Because of the substantiality of the questions raised in Franklin,] the execution of a death sentenced prisoner with a properly preserved and potentially

> valid Franklin claim should be stayed. Our rejection of a stay on this claim then rests only upon Selvage's failure to object to the instruction at the punishment phase or to request additional instruction.

Appendix A, at 10-11, 14.

With respect to Mr. Selvage's related claim -- that the Texas death penalty statute interfered with defense counsel's investigation and presentation of mitigating evidence -- the Fifth Circuit held that the procedural default which barred the Franklin claim also barred this claim which was derived from Franklin:

> Selvage contends that he suffered from ineffective assistance of counsel. As we understand Selvage's argument, it is that the state's process at the penalty phase denies his counsel the opportunity to provide effective counsel. This claim must fail for the reasons that the premise upon which it rests has been rejected.... We are left with a claim of ineffectiveness that is no more than a variation of the Franklin claim.

Appendix A, at 15.

The Fifth Circuit rejected on the merits Mr. Selvage's claim that the Eighth Amendment entitled him to voir dire prospective jurors on the meaning of a life sentence in Texas, holding that instructions to the jury to disregard parole considerations effectively reduced the risk that jurors' misconceptions about the length of a life sentence would influence their sentencing decision:

> If the Texas practice of instructing juries not to consider the effect of parole is sound[,] the refusal to explore veniremens' "understanding" of the subject is an a fortiori case. The point is that the inquiry into parole matters in the selection of a jury cannot be required so long as the state may instruct the selected jury that it cannot consider the subject at all. A contrary assertion borders on the frivolous.

Appendix A, at 7.

REASONS FOR GRANTING CERTIORARI

I.

> THE FIFTH CIRCUIT'S PROCEDURAL DEFAULT HOLDING RAISES QUESTIONS NOT PREVIOUSLY ADDRESSED BY THE COURT WHICH WILL CONTINUE TO BE RAISED IN OTHER CASES AS WELL IF THE COURT ULTIMATELY GRANTS RELIEF IN FRANKLIN V. LYNAUGH.

The Fifth Circuit's procedural default holding in Mr. Selvage's case raises two questions which the Court has not

previously addressed. First, at the time that Mr. Selvage was tried, in February, 1980, was there "cause" for not raising the Franklin claim: was it not "reasonably available to counsel," Reed v. Ross, 468 U.S. 1, 16 (1984), even though the legal basis for the claim was known, when the claim itself had been uniformly rejected by this Court and the Texas Court of Criminal Appeals? Second, if there was no "cause" for failing to raise the Franklin claim, does the application of the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977) to the claim result in a "'fundamental miscarriage of justice,'" Smith v. Murray, ___U.S. ___, 91 L.Ed.2d 434, 446 (1986)? The Fifth Circuit's answers to these questions are too much at odds with the Court's prior decisions to allow them to be the last word for John Selvage or for anyone else similarly situated.

The Fifth Circuit held that there was no cause for failing to raise the Franklin claim at trial, because the legal basis for the claim was known at that time, and the previous rejection of the claim by the Texas Court of Criminal Appeals could not serve to excuse the failure to raise the claim in the state courts. Thus, the Fifth Circuit viewed Mr. Selvage's failure to raise the claim at trial as based upon the futility of doing so. And as the Court has explained, "[P]erceived futility alone cannot constitute cause." Engle v. Isaac, 456 U.S. 107, 130 & n. 36 (1982).

An examination of the state of the law in early 1980 reveals that Mr. Selvage's failure to raise this claim was not based on "perceived futility alone." Most significantly, by early 1980, this Court had on two occasions swept aside any substantial basis for challenging the Texas statute's arguable preclusion of the consideration of mitigating circumstances. In Jurek v. Texas, 428 U.S. 262 (1976), the Court specifically took note of the Texas statute's potential for precluding the jury's consideration of mitigating circumstances, but then found that Texas had avoided this problem by "interpret[ing] [the future dangerousness] question so as to allow a defendant to bring to

the jury's attention whatever mitigating circumstances he may be able to show." Id. at 272. Thus, "Texas law [allows] ... the jury [to] be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Id. at 273. Again in Lockett v. Ohio, 438 U.S. 586 (1978), the Court reiterated its view that, because of the Texas Court's broad interpretation of the future dangerousness question, the Texas statute did not operate "to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." 438 U.S. at 607.

Even though Jurek and Lockett seemed to preclude any challenge to the Texas statute based upon the statute's constriction of the sentencer's consideration of mitigating circumstances, such challenges were nevertheless brought in three Texas cases that were decided by the Court of Criminal Appeals prior to Mr. Selvage's trial. In Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978), the petitioner argued that the statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. In Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds sub nom., Adams v. Texas, 448 U.S. 38 (1980), the appellant "argue[d] that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence ... that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. And in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), the appellant argued that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947.

All of these challenges were rejected by the Texas court, but more importantly, they were rejected by reference to and reliance upon the Court's analyses in Jurek and Lockett, see Quinones, 592 S.W.2d at 947; Adams, 577 S.W.2d at 729-30, or the Texas court's construction of the statute approved in Jurek and Lockett, see Granviel, 561 S.W.2d at 516.

Thus, the legal landscape facing Mr. Selvage's counsel when he tried the issue of punishment in February, 1980 was undifferentiated. The Supreme Court of the United States had twice held that the Texas statute permitted the kind of consideration of mitigating circumstances required by the Constitution, and the Texas Court of Criminal Appeals had three times held that the Supreme Court's analysis foreclosed any of a variety of challenges to the statute's arguable constriction of the proper consideration of mitigating circumstances. In contrast to the legal setting before the petitioner in Engle v. Isaac, where even though the state courts had repeatedly rejected the due process claim which petitioner failed to raise, "numerous [other] courts" had accepted the very same claim, 456 U.S. at 132-33, the legal setting offered absolutely no support for a Franklin-type challenge at the time Mr. Selvage was tried. As the Court has observed in a similar context, where its previous decisions have cut off known constitutional claims, "there will almost certainly be no reasonable basis upon which an attorney could have urged a state court to adopt [his or her] position...." Reed v. Ross, 468 U.S. at 17. To find no "cause" for failure to raise an issue in these circumstances, as the Fifth Circuit has done in Mr. Selvage's case, thus seems to ignore or eviscerate all the "cause" parameters which the Court has articulated over the eleven years since Sykes was decided.

Similarly, the Fifth Circuit has ignored the "fundamental miscarriage of justice" principles which seem plainly applicable to the use of the Sykes rule in this context. The only consideration the Fifth Circuit gave to this principle in Mr. Selvage's case was to note that the Franklin claims "presented

[the court] with no claim of factual innocence...." Appendix A, at 15. Of course, the concept of "'actual'... innocence" requires translation "into the context of an alleged error at the sentencing phase of a trial on a capital offense," Smith v. Murray, 91 L.Ed.2d at 446, but the Fifth Circuit did not undertake the translation. As translated, this concept requires constitutional error which "[]either precluded the development of true facts []or resulted in the admission of false ones," or which "served to pervert the jury's deliberations concerning the ultimate question[s]." Id. at 447. Both of the Lockett errors alleged by Mr. Selvage fell into these categories. Through its effect on defense counsel, the statute precluded the presentation of a psychiatric defense which, in turn, "precluded the development of [the] true facts" underlying Mr. Selvage's moral culpability. Through its exclusion of the proffered mitigating circumstances from the jury's consideration of the statutory questions, the statute "perverted" the jury's sentencing deliberations by preventing the consideration of mitigating circumstances in the determination of Mr. Selvage's sentence.

Accordingly, the Fifth Circuit's answers to both of the procedural default questions raised by Mr. Selvage's case are unsatisfactory. These questions, as much as the merits presented in Franklin, cry out for the Court's considered analysis.

II.

WHEN THE PROCEDURAL QUESTIONS ARE PUT ASIDE, MR. SELVAGE PRESENTS THE SAME ISSUE THAT IS BEFORE THE COURT IN FRANKLIN V. LYNAUGH.

The question before the Court in Franklin v. Lynaugh, No. 87-5546, is clearly drawn. The Texas statute in the typical case -- and Mr. Selvage's case is typical in this respect -- asks the jury to answer only two questions in order to determine the convicted defendant's sentence: whether the murder was committed deliberately, and whether there is a "probability" that the defendant will commit future criminal acts that would threaten society. If the mitigating evidence proffered by the defendant in a particular case can be considered as a mitigating factor in

answering these questions, the sentencing process in that case satisfies the Eighth Amendment's requirement that mitigating evidence "be permitted, as such, to affect the sentencing decision," Lockett v. Ohio, 438 U.S. a' 608. If the mitigating evidence is neither relevant to, nor capable of consideration as mitigating under, one of the statutory questions, however, that evidence is not permitted "as such" to affect the sentencing decision. In fact, if the jurors are true to their oaths, such mitigating evidence cannot affect their sentencing decision at all. The Court must decide in Franklin whether the Eighth Amendment demands resentencing in this latter kind of case under a procedure that permits appropriate consideration of mitigating circumstances.

Mr. Selvage's case is one in which the statutory questions did not permit independent mitigating weight to be given to the mitigating evidence proffered in his behalf. Mr. Selvage was shown to be a person of good character whose life was thrown into profound disarray by drug addiction: after a promising high school career, Mr. Selvage was drafted into the military where he developed an addiction to heroin, which continued to plague him long after his medical discharge from the military. This addiction apparently motivated the robbery which turned into the felony murder for which he was convicted and sentenced to death. This mitigating evidence did not rebut the notion that the crime was committed deliberately. Moreover, it did not call into question the probability that Mr. Selvage would continue to commit violent criminal acts that would pose a threat to society. If anything, the evidence suggested that he would continue to pose such a threat. Nevertheless, reasonable jurors could have believed that the mitigating evidence also called for a sentence less than death, because it was evidence of personal tragedy, not meanness of spirit -- evidence of the "frailt[y] of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), to which an appropriate response could be compassion, not retribution. Id.

But as in Franklin, even if Mr. Selvage's jurors concluded

that the mitigating evidence called for a life sentence, they had no procedural mechanism through which to express that conclusion. They could well have decided that the murder was committed deliberately and that there was a probability that Mr. Selvage would continue to commit violent criminal acts that would threaten others. Yet upon making these findings, the jurors were required to impose a sentence of death -- they were given no way to give effect to their view that the mitigating evidence "as such," called for a life sentence. If this defect violated the Eighth Amendment in Franklin's case, it also did in Mr. Selvage's case.

III.

EVEN IF THE COURT DECIDES IN FRANKLIN THAT THE TEXAS DEATH PENALTY STATUTE DOES NOT PRECLUDE THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AMENDMENT, A CONDEMNED TEXAS PRISONER SHOULD BE ALLOWED THE OPPORTUNITY TO SHOW THAT REASONABLY EFFECTIVE COUNSEL COULD NEVERTHELESS HAVE CONSTRUED THE STATUTE AS PRECLUDING THE CONSIDERATION OF SOME MITIGATING CIRCUMSTANCES, AND THAT BECAUSE HIS LAWYER HELD THIS VIEW, RELEVANT MITIGATING EVIDENCE WAS NOT INVESTIGATED OR PRESENTED ON HIS BEHALF, THEREBY DEPRIVING HIM OF THE ASSISTANCE OF COUNSEL AND OF AN INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

John Selvage is psychotic and has suffered continually from these disorders since at least 1970. In 1979, when he participated in the robbery that led to the homicide herein, he was likely suffering the effects of psychosis.

Had Mr. Selvage's sentencing jury known about these disorders, they might have decided that he should not be sentenced to death. As Justice O'Connor has explained,

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable ... to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, ___U.S.___, 93 L.Ed.2d 934, 942 (1987). See also Skipper v. South Carolina, ___U.S. ___, 90 L.Ed.2d 1, 12 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J.,

concurring)("[s]ociety's legitimate desire for retribution is less strong with respect to ... defendants who have reduced capacity for considered choice[;] ... [e]vidence concerning the defendant's ... emotional history thus bear[]s directly on the fundamental justice of imposing capital punishment"). However, the jury had no opportunity to weigh Mr. Selvage's culpability in light of his mental illness, because no evidence of his illness was presented at trial.

This evidence was not presented because trial counsel, in reasonable reliance upon the Texas death penalty statute's limitation, forewent substantial investigation, presentation and argument of this compelling mitigating evidence. They forewent those essential functions of defense counsel in a capital case because, in their view, Texas' capital sentencing scheme precluded consideration of Mr. Selvage's illness as mitigating evidence in the circumstances of his case. They believed that presentation of such evidence would have assisted the state in proving that there was a possibility that Mr. Selvage would be violent in the future. Further, they believed it could not prevent the jury from finding that the homicide was "deliberately" committed. Even though they believed that this evidence would have weighed heavily in favor of a life sentence, they believed that the jury would have had no means through which to give effect to the mitigating weight of the evidence, for upon giving the evidence aggravating weight -- which it would have been constrained to do -- the jury's "consideration" of this evidence would have mandated the death sentence.

The question presented is whether the constraint felt by Mr. Selvage's counsel, which affected their investigation and presentation of mitigating evidence, violated Mr. Williams' rights under the Constitution. We believe that it did for the following reasons:

(a) Counsel's belief that the Texas statute operated to preclude the jury's ability to consider mental illness as a mitigating circumstance was reasonable. Concededly, it was at

variance with the Court's view of the operation of the statute in Jurek v. Texas, 428 U.S. 262 (1976), and with the Texas Court of Criminal Appeals' view since Jurek. And it may be at variance with the Court's view of the operation of the statute when it decides Franklin. Nevertheless, if Mr. Selvage had challenged -- as "deficient performance" -- his counsel's failure to investigate and present his mental illness as a mitigating circumstance, counsel's explanation of why the evidence went uninvestigated and unpresented would have been deemed a reasonable strategic choice. It is generally reasonable to forego the presentation of evidence helpful to the defendant if it carries with it the risk of being more harmful than helpful. For these reasons, counsel such as Mr. Selvage's counsel cannot be deemed to have performed deficiently for having made the decision they made.

(b) At the same time, counsel's strategic choice was not dictated by their view of how the jury would weigh the evidence if the jury were unfettered in its consideration of the evidence. Rather, their view was dictated by their belief that the statutory "special issues" provided no mechanism through which the jury could consider the mitigating aspects of the evidence of mental illness. They stated quite clearly that if, in their view, the jury had been provided with such a mechanism, they could well have decided to present evidence of mental illness even though it might at the same time have assisted the state in establishing Mr. Selvage's future dangerousness. Accordingly, counsel's strategic choice not to investigate and present evidence of mental illness was the indirect product of the Texas statute -- or at least of their perception of the manner in which it operated to constrain the jury -- rather than the product of their weighing of the evidence.

(c) For these reasons, the Texas statute, rather than the unreasonableness of counsel or the nature of the mitigating evidence, operated to constrict counsel's investigation and presentation of evidence. The result was a violation of the

Sixth Amendment right to the effective assistance of counsel -- not as a result of counsel's deficient performance, but as a result of Texas' interference with counsel's performance. As the court explained in Strickland v. Washington, 466 U.S. 668, 686 (1984), "[g]overnment [as distinct from deficient performance by counsel] violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."

The question presented, therefore, is whether the Texas statute was reasonably susceptible to the reading given to it by Mr. Selvage's counsel, and if so, whether that susceptibility amounted to the kind of government interference "with the ability of counsel to make independent decisions about how to conduct the defense," that mandates relief, without any particular showing of prejudice, under Strickland.

This question was one aspect of the question upon which certiorari was granted in Hitchcock v. Wainwright, No. 85-6756. See Brief for Petitioner, at 23-35. When Hitchcock was decided, however, the Court did not reach this issue. See Hitchcock v. Dugger, ___U.S.___, 95 L.Ed.2d 347 (1987). In the light of the Court's already-manifested interest in this question, and in light of its importance in a state like Texas, where counsel may have suffered significant interference in their ability to represent their clients, the Court should take up this question again.

IV.

BAREFOOT V. ESTELLE REQUIRED A STAY OF EXECUTION AND PLENARY CONSIDERATION OF MR. SELVAGE'S VOIR DIRE CLAIM IN THE FIFTH CIRCUIT, GIVEN THE PENDENCY BEFORE THE EN BANC FIFTH CIRCUIT OF THE SAME CLAIM IN ANOTHER CASE, THE OUTCOME OF WHICH WOULD CONTROL THE DISPOSITION OF MR. SELVAGE'S APPEAL.

In Barefoot v. Estelle, 463 U.S. 880 (1983) the court set forth guidelines to assist the lower federal courts in determining when to grant stays of execution in capital cases and when to dispose of such cases summarily in the face of an impending execution. Id. at 892-96. In constructing these

guidelines, the Court sought to strike a balance between the state's desire for finality and the condemned person's right to be spared from execution if "questions of substance" remained to be resolved in his case. This balance was struck unjustly and incorrectly by the Fifth Circuit in Mr. Selvage's case. The resulting decision makes a mockery of the Barefoot Court's profound concern that the competing interests of both the state and the condemned be fairly taken into account in circumstances such as this.

In King v. Lynaugh, 828 F.2d 257 (5th Cir. 1987), the Fifth Circuit held that the refusal to allow a capital defendant to conduct a limited voir dire on whether jurors held misconceptions about Texas parole law violated the Eighth and Fourteenth Amendments. The King panel found that widely held misconceptions about the effect of imposing a life sentence raised an unacceptable risk that a jury might impose a sentence of death largely on the basis of mistaken notions of parole law:

> The significance of the information King sought to discover is clear. A juror might decline to impose the death penalty if the alternative were confinement of the criminal for life without possibility of parole because the general public would be adequately protected by such a life sentence. Similarly, a juror might decline to impose the death penalty on a particular defendant if he believed that the individual to be sentenced would no longer represent a menace if he were confined for at least twenty years without parole for the crime he committed. If, on the other hand, a juror believed it were likely -- or even possible -- that a convicted person would be released in a few years and the juror believed that the criminal would then still constitute a hazard to the public, that juror might conclude that only the death penalty would adequately ensure public safety.

828 F.2d at 260.

Although King broke new ground, it did so with tools this Court has provided. In California v. Ramos 463 U.S. 992 (1983), the Court sustained against constitutional challenge the state's practice of instructing jurors that sentences of life without parole could be commuted. Thereafter, in Caldwell v. Mississippi, 472 U.S. 320 (1985), Justice O'Connor explained that if the state chose to correct jurors' misunderstanding about pardon or parole or other post-conviction matters, the

Constitution required that the corrective information be accurate, because jurors often "harbor misconceptions" about such matters. 472 U.S. at 342 (O'Connor, J., concurring). In another area where jurors often harbor misconceptions -- when a homicide involves a defendant who is black and a victim who is white -- the Court has held that a defendant is entitled to voir dire prospective jurors on racial misconceptions and prejudices in order to reduce the risk that such misconceptions would influence the outcome of the capital sentencing proceeding. Turner v. Murray, 476 U.S. 1 (1986).

The King panel brought these two lines of "juror misconception" cases together, reasoning that if the Constitution requires the states who undertake to cure juror misconceptions about life sentences and parole to do so accurately, and if the Constitution requires the states to give defendants the chance during voir dire in a capital case to root out misconceptions based on race, the Constitution requires that the defendant be given the same opportunity during voir dire to root out misconceptions based on parole.

In light of the new ground broken by the King panel, and in light of a vigorous dissent arguing that the new ground was an unwarranted extension of Eighth and Fourteenth Amendment principles, the Fifth Circuit decided to rehear King en banc. King v. Lynaugh, 828 F.2d 269 (5th Cir. 1987). As of the time the instant pleading was filed, however, no opinion had issued from the en banc court in King.

Mr. Selvage presented to the District Court the very same issue addressed in King. Since the state courts chose to address the merits of the King issue in his case, the District Court found there was no procedural default which might bar review of the merits in federal habeas proceedings. Further, the District Court found no abuse of the writ.[3] For these reasons, the District Court determined that the en banc decision in King would

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[3] The Fifth Circuit agreed with these findings. See Appendix A, at 6.

control the resolution of the same issue in Mr. Selvage's case, that adjudication of the King issue should be withheld pending the en banc decision in King, and that Mr. Selvage's execution should be stayed until King was decided and could be applied in his case.

In these circumstances, Barefoot plainly called for the very action taken by the District Court. Manifestly, a "question of substance" was presented by Mr. Selvage, and the state's quest for finality had to be given secondary importance in the balance called for by Barefoot. Nevertheless, the Fifth Circuit entertained and granted a motion thereafter by the state to dissolve the District Court's stay of execution. The basis for the Fifth Circuit's action demands the corrective intervention of this Court.

The Fifth Circuit panel in Mr. Selvage's case justified its action by deciding the merits of Mr. Selvage's claim. The crucial factor, in its view, was that the trial court instructed the prospective jurors to give no consideration to parole considerations. Such an instruction "cured" any misconceptions the jurors might have had about the length of life sentences by requiring such misconceptions to be set aside. Appendix A, at 7.

In deciding that Mr. Selvage's claim was insubstantial for this reason, the panel put itself in direct conflict with the King panel, which had expressly rejected this rationale:

> The state contends that, by instructing the jury that parole 'is no concern of yours' and is not to be considered, the court benefitted King by essentially telling the jury that 'life means life.' If a misconception exists, no instruction that merely directs jurors to disregard issues of parole in making their sentencing determination can erase that fallacy from their minds. That voir dire could easily minimize the risk to the accused created by this misconception strengthens King's claim to constitutional protection from the potential ramifications of failing to strike a juror who harbors a mistaken belief.

828 F.2d at 260.

It does not matter at this point which of these conflicting panel views should ultimately prevail. What does matter profoundly is that the King panel's views have already been taken

up by the en banc Fifth Circuit for rehearing. Surely during the pendency of a rehearing en banc, another panel of the circuit cannot be allowed to decide anew the issue already pending before the en banc court. Such a process, in light of Barefoot, elevates the state's interest in finality over the most fundamental notions of orderly judicial processes and due process.

The Court should not tolerate such a radical inversion of the values it sought so carefully to hold in balance in Barefoot.

CONCLUSION

For these reasons, the Court should grant Mr. Selvage's petition for writ of certiorari and stay his execution.

March 29, 1988

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No. 87 - _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN HENRY SELVAGE,
Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner JOHN HENRY SELVAGE, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. An affidavit of indigency will follow.

Dated: March 29, 1988

Respectfully submitted,

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